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NO. 82-6775

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT C. GILLIARD, JR.,
Petitioner

VS.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHERE PETITIONER HAS FAILED TO FOLLOW THE RULES OF THIS COURT, IN THAT HIS AFFIDAVIT DOES NOT ACCOMPANY HIS MOTION TO PROCEED IN FORMA PAUPERIS, AND HIS STATEMENT OF MAILING IS NOT VALIDLY NOTARIZED, SHOULD THIS COURT CONSIDER HIS PETITION?

II. WHERE, IN THIS CAPITAL CASE, THE CONSTITUTIONALITY OF SUBMITTING TO THE JURY THE AGGRAVATING FACTORS THAT THE MURDER WAS COMMITTED 1) DURING THE COURSE OF A ROBBERY, AND 2) FOR PECUNIARY GAIN HAS NEVER BEEN PRESENTED TO THE LOWER COURT, CAN IT BE GROUND FOR REVIEW HERE?

III. WHERE, IN THIS CAPITAL CASE, THE CONSTITUTIONALITY OF THE SUBMISSION TO, AND AFFIRMATIVE FINDINGS BY, THE JURY, OF THE AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL HAS NEVER BEEN PRESENTED TO THE LOWER COURT, CAN IT BE GROUND FOR REVIEW HERE?

IV. WHERE A STEPHENS V. ZANT [631 F.2d 397 (5th Cir. 1980), cert. granted, 454 U.S. 814 (1981)] - TYPE ISSUE, CONCERNING DEFECTIVE AGGRAVATING FACTORS, WAS NOT RAISED IN THE LOWER COURT, CAN IT BE GROUND FOR REVIEW HERE?

V. WHERE PETITIONER HAS NEVER BEFORE MADE THE CLAIM THAT A HEARING SHOULD HAVE BEEN ALLOWED TO DETERMINE WHETHER OR NOT A PATTERN OF PRACTICE EXISTS WITH REGARD TO THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES, MAY HE NOW MAKE THAT CLAIM IN THIS COURT?

VI. WHERE PETITIONER'S CLAIM CONCERNING "AGENCY DOMINATION" PRESENTS NO FEDERAL ISSUES, AND WHERE THE CLAIM HAS NOT PREVIOUSLY BEEN RAISED, CAN IT BE GROUND FOR REVIEW HERE?

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Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Robert C. Gilliard, Jr. v. State of Mississippi, 428 So.2d 576 (Miss.1983). Rehearing was not requested. A copy of the opinion affirming conviction and sentence is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3), and poses five (5) questions for review.

STATEMENT OF THE CASE

Petitioner, Robert C. Gilliard, Jr., was indicted for the crime of capital murder by the Grand Jury of the Second Judicial District of Jones County, Mississippi, during the September, 1981 Term. The indictment emanated from the August 27, 1981 shotgun

slaying of Grady Chance during the commission of an armed robbery of Chance's business, the Best Chance Package Store in Laurel, Mississippi.

Gilliard was allowed to enter a plea of guilty, after being extensively examined by the trial judge, at which time he specifically admitted all of the charges as laid in the indictment.

A sentencing trial was held (pursuant to Section 99-19-101, Miss. Code Ann. (Supp.1982)), and Gilliard was sentenced to die in the gas chamber. The jury found the existence of the following aggravating factors:

1) the capital murder was comitted while Gilliard was engaged in the commission of the crime of robbery;

2) the capital murder was committed for pecuniary gain;

3) the capital murder was committed in an especially heinous, atrocious or cruel manner; and

4) Gilliard was previously convicted of a felony offense involving the use or threat of violence to a person.

On automatic appeal to the Mississippi Supreme Court, the judgment in the trial court was affirmed without dissent on February 16, 1983, and March 23, 1983 was set for execution of the death penalty. Gilliard v. State, 428 So.2d 576 (Miss.1983).

A stay of execution pending filing and disposition of this petition was granted by this Court on March 14, 1983.

The facts of the robbery-killing, as found by the Mississippi Supreme Court, are as follows:

> The evidence for the State shows that on August 27, 1981, Gilliard, age thirty-seven (37) years, lived with one Tessie Jones in Heidelberg, Mississippi. On that date, they attended a party and met Warren Seals and Edwin Darby. They were drinking intoxicating liquor and the group decided to rob some business in Laurel. They drove to two

establishments there, but several customers were in each place and they passed them up. Eventually, they drove to the Best Chance Package Store on Ellisville Boulevard, where Gilliard and Darby got out of the car, leaving Seals and Tressie Jones inside.

Gilliard was armed with a .25-caliber automatic pistol and Darby had a sawed-off shotgun. Gilliard exchanged the .25-automatic to Darby for the shotgun before leaving the automobile. They entered the store and saw the proprietor, Grady Chance, sitting in a chair facing the entrance to the store. Mrs. Wilma Chance, his wife, was sitting on a stool behind the counter and was talking on the telephone. Darby grabbed the telephone from her hand and jerked it off the wall. The robbers then ordered Mrs. Chance to open the cash register and give them the money, which she did. Mr. Chance told them, "We don't have much money here. We went to the bank." He remained sitting in the chair and Gilliard went behind the counter in search of more money. They took approximately two hundred dollars ($200.00) from the store.

Gilliard ordered the Chances to give him the keys to their automobile, planning to take the same and drive it to a different place where Seals would pick them up. Mrs. Chance testified that her husband was still sitting in the chair and was only about two feet away from Gilliard when he shot Mr. Chance in the chest, the load causing him to spin and fall to the floor. Gilliard and Darby then left and went around the back of the store. Seals started the car, left the scene and was unable to find them. Mrs. Chance went to a nearby restaurant for help, where a nurse had heard the noise and went to the store. She found Mr. Chance lying in a pool of blood with no pulse or breathing. She attempted to resuscitate him without success. Detective Jonathan Hare of the Laurel Police Department received a call about the robbery around 8:15 p.m. and immediately went to the scene (other officers had already arrived). He photographed the body and the store and collected items of physical evidence, consisting of a spent shotgun shell and wadding.

428 So.2d at 577-78.

REASONS FOR DENYING THE WRIT

I. Petitioner Has Failed To Comply With The Rules Of This Court

A.

Rule 46(1), Rules of the Supreme Court of the United States, provides in part as follows:

> A party desiring to proceed in this Court in forma pauperis shall file a motion for leave so to proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4. . ., setting forth with particularity facts showing that he comes within the statutory requirements.

In the case at bar, no affidavit from petitioner accompanies his motion to proceed in forma pauperis. Rather, the motion is accompanied by an affidavit[1/] from petitioner's counsel, stating that an affidavit from petitioner "will be forwarded to the Court immediately upon receipt." The rule does not provide for such a procedure. Moreover, as of June 15, 1983, the Clerk of this Court has not received petitioner's affidavit. Rule 46 further states, "the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules. . . ." Therefore, the petition in this case should never have even been filed.

B.

Rule 28(2), Rules of the Supreme Court of the United States, provides that a document is deemed timely filed if it is deposited in the United States mail, first class postage prepaid, properly addressed to the Clerk of this Court, within the time allowed for filing, with the additional provision that

> there is filed with the Clerk a notarized statement by a member of this Court, setting forth the details of the mailing, and stating that to his knowledge the mailing took place on a particular date within the permitted time.

1/ Which is defective in the same respect as petitioner's statement of mailing. See I(B), infra.

In the case at bar, petitioner's statement of mailing contains an invalid notarization[2/] which renders the entire statement invalid. Consequently, the petition for writ of certiorari cannot be deemed to have been timely filed under Rule 28.

The failure to comply with the Rules of this Court, without more, is ground for the dismissal of the petition.

II. Petitioner Did Not Raise A Constitutional Issue In The Lower Court With Regard To Duplicate Or Cumulative Instructions On Aggravating Factors, And May Not Raise That Ground For the First Time Before This Court.

III. Petitioner Did Not Raise As An Issue In The Lower Court The Constitutionality Of The Trial Court's Submission To The Jury, And The Jury's Affirmative Finding, Of the Aggravating Factor That The Capital Murder Was Especially Heinous, Atrocious, Or Cruel; Consequently, He May Not Now Raise That Issue In This Court.

In his petition for writ of certiorari, petitioner, for the first time, raises issues which question the constitutionality of three statutory aggravating circumstances as they were applied in his case. Specifically, he contends that the following two aggravating circumstances "form a constitutionally infirm two-part series of defective cumulative and duplicate instructions" (petition, p. i):

> The capital murder was committed while the defendant, Robert C. Gilliard, Jr., was engaged in the commission of the crime of robbery.
>
> The defendant, Robert C. Gilliard, Jr., committed the capital murder for pecuniary gain.[3/]

2/ The statement was notarized on May 17, 1983, while the notary's stamp reveals that her commission expired on March 30, 1983.

3/ These two factors are set out as aggravating circumstances in Section 99-19-101(5)(d) and (f), Miss. Code Ann. (Supp. 1982), and were submitted to the jury in Instruction C.20. (R. V, 803-06)

In addition, petitioner contends that the submission and affirmative finding of the following aggravating factor were constitutionally defective. (petition, p. 10):

> The defendant, Robert C. Gilliard, Jr., committed the capital murder in an especially heinous, atrocious, or cruel manner.[4/]

We readily concede that on direct appeal petitioner raised before the lower court certain issues concerning the foregoing three aggravating factors. The issues then raised, however, were not couched in federal constitutional terms. As is apparent from his brief on direct appeal (a copy of which is appended hereto as Appendix A), petitioner attached no federal constitutional significance whatsoever to his piror complaints concerning the aggravating factors.

It is well-settled that, under the rationale of Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), and Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969), this Court lacks jurisdiction to decide an issue that has not been presented to the state courts, or has not been presented to those courts in a federal constitutional context. This rule mandates absolute bar of petitioner's first two claims before this Court.

IV. Petitioner Did Not Raise A Stephens v. Zant[5/] - Type Issue In The Lower Court, And May Not Raise One For The First Time Before This Court.

Petitioner concedes that the third issue he urges to this Court was not raised below, but contends that it "is necessarily implicated by the paucity of the Mississippi Supreme Court's

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4/ This factor is set out as an aggravating circumstance in Section 99-19-101(5)(h), Miss. Code Ann. (Supp.1982), and was submitted to the jury in Instruction C.20. (R. V., 803-06).

5/ Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), cert. granted, 454 U.S. 814, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981); question certified to Georgia Supreme Court, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982); question answered by Georgia Supreme Court, 250 Ga. 97, 297 S.E.2d 1 (1982).

reasoning in discussion of aggravating factor discussion." (petition, pp. 8-9) Under the principles of Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L.Ed.2d 392 (1981), and Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398 (1969), this Court lacks jurisdiction to decide this issue.

Moreover, for purposes of discussion only, we also submit that the case at bar simply does not involve a Stephens v. Zant - type situation. Stephens involved the situation where one of the aggravating factors found by the jury was subsequently declared unconstitutional. Thus, the issue was whether or not the death sentence could stand on the remaining aggravating factors. In utter contrast, the case at bar involves no invalidation of an aggravating factor. Rather, the lower court here, at least by implication, upheld the validity of the aggravating factors, as well as the jury's determination of their applicability to the case at bar. Accordingly, petitioner's contention that this case is afflicted with a Stephens v. Zant - type problem is clearly untenable.

V. Petitioner Never Requested in The Trial Court That A Hearing Be Held To Determine Whether Or Not A Pattern Of Practice Exists With Regard To the Prosecutor's Use Of Peremptory Challenges; Nor Was Such A Claim Presented On Direct Appeal; Therefore Petitioner May Not Now Claim That He Was Not Afforded Such A Hearing.

At his trial, petitioner moved to quash the jury panel on the ground that all of the peremptory challenges used by the prosecutor were used to exclude black veniremen.[6/] (R. III, 446) The motion was overruled, and that ruling was assigned as error on

6/ We take issue with petitioner's statement that the black veniremen who were peremptorily challenged by the prosecutor "were the only blacks eligible in the venire for the eventual panel. . . ." (petition, p. 5) The falsity of that statement is evidenced by the fact that the alternate juror was a black man. (R. V, 784)

direct appeal to the Mississippi Supreme Court. That court, citing Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965), affirmed the trial court's ruling.

In his petition to this Court petitioner states as follows:

> Here the defense sought to pursue the jury exclusion issue further before the trial court, but the judge, far from allowing a hearing to determine whether a pattern of exclusion existed in other criminal trial, foreclosed the inquiry entirely.
>
> (petition, p. 14)

Simply put, the statement is not true. The record reflects that, at petitioner's request, the prosecutor was made to take the stand and testify as to the reasons behind his use of peremptory challenges. When questioning of the prosecutor was completed, petitioner's counsel stated, "That's all I have by way of evidence on this motion and we move to quash the jury panel." (R. III, 468). Petitioner's pursuit of the jury exclusion issue is thus revealed to have ended by his own choice, not by the trial judge's foreclosure.

At no time did petitioner present to the trial court or to the Mississippi Supreme Court the issue he seeks to present to this Court, i.e., whether or not he was entitled to a hearing to explore past prosecutorial practices with regard to the use of peremptory challenges. Consequently, this Court lacks jurisdiction to entertain that issue. Webb v. Webb , 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

VI. Petitioner's Claim Concerning "Agency Domination" Presents No Federal Issue, Nor Was It Raised Below; It Is Therefore Barred From Consideration by This Court.

Petitioner claims that he should "have been allowed at trial to develop further material on 'agency' domination of [his] will... and to proceed to an offer of proof and/or a hearing. . . ."

(petition, p. ii) He has failed, however, to isolate or voice any constitutional ramifications of the claimed error. Thus, the claim remains purely a matter of state law, beyond this Court's jurisdiction to review.

Furthermore, petitioner's current desire for a hearing on "agency domination" was never made known to the trial court or to the Mississippi Supreme Court.[7/] Therefore the claim is barred. Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

CONCLUSION

For the reasons stated the petition for writ of certiorari should be denied.

Respectfully submitted,

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7/ The record does not bear out petitioner's claim that "[f]urther inquiry of Seels [sic] was cut off by the State's objections sustained by the trial court." petition, p. 6. (R. IV, 592-612)

CERTIFICATE OF SERVICE

I, Charles W. Maris, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the above and foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to Honorable David M. Corwin, 140 Henry Street, Brooklyn, New York 11201.

This, the 16th day of June, A.D., 1983.

Charles W. Maris Jr

SPECIAL ASSISTANT ATTORNEY GENERAL

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT C. GILLIARD — APPELLANT

VS. — NO. 53,959

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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Attorney for Appellant

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PROPOSITION FIVE: The Court erred in permitting the State to introduce into evidence certain evidence which had no relevance or probative value in the sentencing phase of this trial, said evidence being highly prejudicial and inflammatory in nature. 5,6

Section 99-19-101 of the Mississippi Code of 1972 6

PROPOSITION SIX: The Court erred in alowing the State to cross-examine the Defendant concerning his entry of a plea of quilty to the crime of capitol murder. 6,7

HOLDEN V. STATE, 85 So. 2d 208, 226 Miss. 726 (1956) 7

PROPOSITION SEVEN: The Court erred in failing to inform the jury as to the "Deal"and Plea negotiations between the State and the Defendant's accomplice, Warren L. Seals, III, and especially in view of the fact that the record discloses that Seals committed perjury in his testimony concerning his knowledge of these matters. 7,8,9

KING V. STATE, 363 So. 2nd 269 (Miss. 1978) 9

PROPOSITION EIGHT: The Court erred in failing to grant a mistrial on account of certain statements made by the County Attorney and District Attorney in their closing arguments, specifically, the fact that the District Attorney in his closing argument stated words to the effect that a life sentence is the same as ten years and then the Defendant would be eligible for parole, and because of the cumulative and prejudicial and inflammatory effect of the closing argument of the State's Attorney's. 9,10,11,12,13

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RILEY V. STATE, 366 So. 2d 19, (Fla. 1979) 16

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PROPOSITION ELEVEN: The Court erred in refusing to impose a sentence of life imprisonment at the conclusion of all the evidence offered by the State and at the conclusion of the Defendant's evidence, or in the alternative the the Court erred in failing to grant Defendant's post-trial motion for vacation of the death sentence and imposition of a life sentence by the Court. 17

CONCLUSION 18

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT C. GILLIARD, JR.	APPELLANT
VS.	NO. 53,959
STATE OF MISSISSIPPI	APPELLEE

BRIEF STATEMENT OF THE CASE

The Appellant, ROBERT C. GILLIARD, JR., was indicted by the September Grand Jury for the Second Judicial District of Jones County, Mississippi, for the capital murder of Mr. Grady Chance, when Mr. Chance was killed during the course of an armed robbery at his liquor store in Laurel, Mississippi. The Appellant entered a plea of guilty to the charge laid in the indictment, and after a trial solely, on what punishment was to be imposed, the jury returned a verdict of death.

BRIEF OF APPELLANT

ARGUMENT AND APPLICABLE LAW

PROPOSITION ONE : The Court erred in overruling the Defendant's Motion for a Change of Venue.

The Appellant filed a Motion for a Change of Venue. As can be seen from a reading of the testimony of the witnesses called in support thereof, it was necessary to hold the Appellant in a city some miles away due to threats on his life; the local television station ran an editorial stating that nationally known convicted murderer should have never gotten life but should have gotten the death penalty; the local news paper ran the armed robbery and murder as a headline story on several occasions; the Defendant had been shown on several occasions on the local television station

being lead to the Courthouse in handcuffs; and liquor stores in the City of Laurel were thereafter ordered to close two hours earlier than in the past. (A 1-4) (R20-76), (A 4-7)(R201-276) (R298-408)

Considering the testimony of the witnesses in this case, especially when taken in conjunction with the Voir Dire of the jury, Appellant repsectfully submits that the Court was in error in failing to grant his Motion for a Change of Venue. Certainly, great care and caution should be taken and deference given to the Motion for a Change of Venue in a case where the death penalty may be imposed. When one looks at the testimony of the witnesses on the Motion and the number of people on Voir Dire who were acquainted with the deceased or his family, who were well known and respected members of the community, one is left with the unmistakable impression that the Motion should have been granted.

ANDERSON V. STATE 92 Miss. 656, 46 So. 65 (1908)

EDDINS V. STATE 110 Miss. 780, 70 So. 898 (1916)

BOND V. STATE 128 Miss. 792, 91 So. 461 (1922)

PROPOSITION TWO: The Court erred in failing to Quash the jury panel which actually rendered the death sentence in this case because of the State's admitted use of it's premptary challenges to excuse all persons of the negro race from the panel solely on the basis of their race. (A 9)(R435-446) (R461-468)

All challenges made by the State of Mississippi in exercising it's premptary challenges were on persons of the negro race, the same race as that of the Defendant. This resulted in an all white panel rendering the death sentence in this case. The Defendant called the District Attorney as a witness and questioned him concerning his reasons for his exercise of the premptary challenges and in support of the Defendant's contention that race was the only motive for their exercise. In the District

Attorney's testimony he was able to think of some reasons for excusing two or three jurors,but testifiedthat he did not remember why he excused the others. The Defendant, and Appellant here,respectfully submits that it is obvious from the testimony given that jurors were excused from this panel solely on the basis of race. While it may be conceded that premptary challenges are those which may be without cause, it is respectfully submitted to this Court that when the Defendant is a member of a minority race, race should not be allowed to be the sole motivating factor for the exercise of premptary challenges so as to result in denying the Defendant in a case from having a jury judge him which represents a fair cross-section of the community. (A 8)(R435-446) (R461-468)

Section 13-5-2 of the Mississippi Code of 1972, annotated as amended, provides as follows:

> "A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status."

Clearly, citizens of this State were excluded from serving on the actual jury in this case on account of race. If this state's statutory provisions are such as to allow prosecution to systematically exclude negro's from serving on jury panels soley because of race, then this statutory scheme is unconstitutional and violates the criminal defendant's right to an impartial jury under the sixth and fourteenth amendments of the Constitution of the United States of America.

TAYLOR V. LOUISIANA 419 US 522, 42 L. ED 2d 690, 95 S Ct 692

PROPOSITION THREE: The Court erred in failing to excuse certain jurors for cause at the request of the Defendant.

The Defendant sought to excuse eight jurors from the jury panel for cause, which motion to excuse for cause was denied

by the Court. Juror Latrell Marion Johnson had known Mr. Chance and his family for about 30 years. (A 5)(R-350)(R-421) Juror Mildred L. Holifield knew Mr. Chance and his wife and had bowled with Mrs. Chance for about two years. (A 5) (R363-366) (R425) Juror Royal Gunnels knew Mr. Chance and his wife and had been to their place of business. He had a business and personal relationship with them and stated that he was pretty sure that he could go by the law and evidence. (R369-372)(R-428) Juror Mary Frances Mozingo knew Mr. Chance's daughter and worked with her on school projects for the past five years. (A 5)(R374-376)(R-429) Juror Sidney Phillips had known Mr. Chance for about 30 years and went deer hunting with him, in addition to buying whiskey at his store. (A 6)(R376-378)(R429-430) Juror Herbert Parker knew Mr. Chance and knew him when he was in the service station business, he stated that about half the people in Laurel knew Mr. Chance. (A 6)(R378-380)(R-430) Juror Charlotte J. Hammonds knew the Chance family and had lived in the same neighborhood with them about eighteen years. His grandson was in the school where she worked. (A 6)(R380-381)(R430-431) Juror Stancil McNeil had a speaking acquaintance with Mr. Chance when he ran a gas station and did business with him. (A 6)(R386-387) (R-432) Juror Osmond S. Mathews had met Mr. Chance at a wheel alignment shop when he was having his car worked on. (A 7)(R-388) (R-426)

Although all of these jurors stated that their relationship with Mr. Chance and their knowledge of him and his family would not influence them in any way, Appellant maintains that this is totally unbelievable. Here we have a man on trial for capital murder, and respectfully submit that great leeway should be taken in granting the Defendant's challenges in order to insure that a fair and impartial jury with no preconceived notion is

impaneled. It is difficult to imagine that the Defendant in this case received such a jury, when the record reflects so many people who were acquainted with the deceased. The Mississippi Constitution of 1890, Section 26, guarantees the Defendant in each criminal case the right to a trial by a fair and impartial jury. Appellant respectfully submits that the failure of the Court to excuse these jurors for cause, denied this Defendant that right under our Constitution.

PROPOSITION FOUR: The Court erred in excusing certain jurors for cause at the request of the State.

The Court excused Hillary Pugh for cause at the State's request and over the objection of Defense counsel. The Defendant was Pugh's wife's second cousin, and he stated he believed he could serve and go by the law and the evidence, but would rather not. (A 7)(R307-308)(R417-418) This juror was not related to the Defendant in any degree that would prohibit from serving on the jury, and he further stated that he could follow the law and the evidence. He simply expressed a preference for not serving on the jury panel. The Appellant respectfully sumbits that it was error of the Court to allow the State to excuse this juror for cause, especially so in view of the fact of him being of the same race as the Defendant. The effect of allowing this juror to be improperly excused for cause was to allow the State of Mississippi, in essence a thirteenth premptary challenge to which it was not entitled. Mississippi Code of 1972, anotated, as amended, Section 99-17-3. Additional, this further inhanced the ability of the State to insure that there would be no black members of the panel which rendered a decision in this case.

PROPOSITION FIVE: The Court erred in permitting the State to introduce into evidence certain evidence which had no relevance or probative value in the sentencing phase of this trial, said evidence being highly prejudicial and inflammatory in nature.

Over persistant objection of Defense counsel, the State was allowed to introduce a drawing of the scene of the crime, pictures of the scene of the crime together with the body of the deceased, shotgun pellets, wadding, and shell casings, pictures showing where the accomplice, Warren L. Seals, III, parked his car, and numerous witnesses were allowed to testify as to the condition of the body at the scene of the crime and what they found when they arrived. Other witnesses were allowed to testify concerning shotgun and conversations and statements they had with the Defendant. These witnesses included John M. Allen, Wanda Gayle Shoemake, Jonathon Hare, and Paul Little. (A 9-14)(R478-551) The Defense counsel objected to all of these matters on the grounds that the Defendant had already plead guilty to the crime of capital murder and that these matters could have no bearing on determining what sentence could be imposed and were merely prejudicial and inflammatory. Section 99-19-101 of the Mississippi Code of 1972, annotated, as amended, provides that if the Defendant has pleaded guilty:

> "Evidence may be presented as to any matter that the Court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances."

None of the testimony above complained of could possibly have any relevance at the sentencing phase of a trial of a Defendant who has already entered a plea of guilty to the charge laid in the indictment. This introduction was a clear violation of the provisions of the Code section above quoted, and Appellant respectfully submits that the allowing of the introduction of this evidence was reversible error.

PROPOSITION SIX: The Court erred in allowing the State to cross-examine the Defendant concerning his entry of a plea of guilty to the crime of capitol murder.

During the testimony of the Defendant, he was not allowed to testify that the murder committed during an armed robbery was an unintentional act by him. The State was further allowed to extensively cross-examine him as to the entry of his guilty plea. (A 17-18) (R644-649)

There was no dispute as to the guilt of the Defendant, and the purpose in illiciting this type of testimony was to prejudice the jury, and in effect to attempt to impeach the Defendant on a collateral matter. This Court is held that it is not permissible to impeach a witness on a collateral matter.

HOLDEN V. STATE, 85 So. 2d 208, 226 Miss. 726 (1956)

PROPOSITION SEVEN: The Court erred in failing to inform the jury as to the "Deal" and Plea negotiations between the State and the Defendant's accomplice, Warren L. Seals, III, and especially in view of the fact that the record discloses that Seals committed perjury in his testimony concerning his knowledge of these matters.

Warren S. Seals, III, called as a witness by the State of Mississippi. His testimony was to the effect that the master-mind of the armed robbery of the Chance Package Store was the Defendant, ROBERT C. GILLIARD, JR., and that the whole thing had been GILLIARD'S idea. He further testified that he was not indicted for capital murder and was the driver of the get-away-car. He stated that he first decided to start talking with the District Attorney after he talked to his lawyer and was not promised anything for his cooperation and that no promises of any kind had been made to him. (A 14-15)(R582-612)

Subsequent to the testimony of Seals, Defense counsel requested for the record that the District Attorney reveal any information that he had communicated to the witness Seals or to Seals' attorney concerning Seals' indictment for armed robbery, and about any communication about what would be done concerning Seals' participation in the murder which occurred during the

armed robbery. The District Attorney in the form of a Stipulation for the record stated that he first had contact with Warren Seals on September 6, 1981, at the Laurel Police Department and testified that he told Seals that if he would cooperate truthfully with the State, that the State would not seek the death penalty against him, so long as he was not the individual who fired the fatal shot. Thereafter Seals gave the statement implicating the Defendant GILLIARD. On the recommendation of the District Attorney, the Grand Jury returned an indictment against Seals as an accessory before the fact to the crime of armed robbery. The District Attorney testified that he had talked with Seals' attorney and informed him that if his client would testify truthfully for the State that he would recommend, on a plea of guilty, that he be sentenced to serve a term of ten years in the State Penitentiary. Seals' attorney indicated to the District Attorney that he was willing to except this and that while he would not specifically inform his client as to what the State's recommendation would be, he would inform his client of the negotiations and that the recommendation would be a sentence in the State Penitentiary. (A 19-20)(R674-679)

As can be seen from the above the witness Seals clearly committed perjury in his testimony as to regards to the time when he first talked to the District Attorney, as to his knowledge of plea negotiations and the "Deal", and as to whether he had been promised anything in exchange for his testimony. In spite of this the Court refused request of Defense counsel that the jury be informed as to the negotiations and arrangements between Seals and the State of Mississippi. (R-703)(R-735) (R769-770)(R843-845)(A 27-30)

This Court has held that where the Defense repeatedly request disclosure of all concessions or allowances made by Prosecution to an alledged co-conspirator of Defendant and where on cross-examination the co-conspirator denied making a "Deal" with the Prosecution in exchange for testimony against the Defendant, and were further the trial Court knew of the grant of immunity to the co-conspirator in exchange for testimony when it denied Defendant's repeated request for such disclosure, even though the co-conspirator claimed his attorney had not informed him of the deal, the trial Court reversibly erred in allowing the jury to believe that the co-conspirator had not been granted any type of deal or immunity.

KING V. STATE 363 So. 2d 269 (Miss. 1978)

In King, supra, this Court also stated that the knowledge of the co-conspirator's attorney must be imputed to him. In the case at bar, the grant of immunity was promised directly to the co-conspirator and other aspects of the "Deal" were communicated to his attorney. There is a direct conflict between the testimony of the Defendant and Seals as to who was the instigator and master-mind of this armed robbery and killing. The jury was effectively denied the right to know that the co-conspirator, Seals had lied and committed perjury in his testimony at a time when the co-conspirator, Seals was seeking to blame the entire affair on the Defendant, GILLIARD, who ultimately received the penalty of death, while Seals was given a sentence of ten years.

PROPOSITION EIGHT: The Court erred in failing to grant a mistrial on account of certain statements made by the County Attorney and District Attorney in their closing arguments, specifically, the fact that the District Attorney in his closing argument stated words to the effect that a life sentence is the same as ten years and then the Defendant would be eligible for parole, and because of the cumulative and prejudicial and inflammatory effect of the closing argument of the State's Attorney's.

In his closing argument, the County Attorney, Mr. Walters, stated to the jury, "I submit to you that it is time for a jury as yourselves to get rid of people like Gilliard and send a message to any of those who would commit an armed robbery and murder in Jones County". The Defense counsel duly objected to this and moved for a mistrial, which motion was overruled by the Court. This Court has repeatedly stated that State's Attorneys are not to engage in personal abuse or vilification of a Defendant or appeal to passion or prejudice. Further, emotional appeals and melodramatic actions are to be eschewed and the State's Attorney's should confine themselves to the facts and evidence and inferences which the facts can reasonably support.

STEWART V. STATE, 263 So. 2d 754, (Miss. 1972)

PIERCE V. STATE, 289 So. 2d 901, (Miss. 1974)(A 26-27)(R747-755)

In the closing argument made by the District Attorney, Mr. Smith, one of the most prejudicial and serious errors of the trial occurred when the following transpired, to-wit:

MR. SMITH:

Speaking of how long things go-- about the penitentiary. I think-- don't believe for a second that Mr. Parrish is telling you that, "well, he will get life," and then I guess he is wanting you to believe that after he dies they are going to keep him up there thirty more years. It doesn't work like that about how long you are at the penitentiary, and he knows as well as I do, life is ten years and you are eligible then for parole.

MR. PARRISH:

We object, your Honor, and move for a mistrial.

MR. SMITH:

He brought it up about the rest of his life there, Judge.

MR. PARRISH:

We object and ask that the jury be instructed to disregard that statement by Mr. Smith. That's ---

MR. SMITH:

-- he brought it up.

MR. PARRISH:

-- improper argument.

THE COURT:

Overruled, in view of the argument made by defense counsel.

MR. SMITH:

He knows that.

MR. PARRISH:

We ask for a mistrial, your Honor.

THE COURT:

Overruled.

MR. SMITH:

And I know that. And so I ---

MR. PARRISH:

-- we ask for a bill of exceptions to this --

MR. SMITH:

-- a record is being made and he doesn't need it, Judge.

THE COURT:

All right, you may present your bill of exceptions. (A 29-30)(R767-770)

This line of argument clearly and unmistakably tended to induce a death sentence from this jury. There was absolutely no evidence or testimony in the record to support such an argument.

In WINDHAM V. STATE, 45 So. 861 (Miss. 1908), this Court held that it was reversible error to tell the jury in a murder trial the range of punishment that might be imposed for manslaughter, as this tended to induce a conviction of manslaughter.

In HARTFIELD V. STATE, 189 So. 2d 530(Miss.1939), this Court held that it was reversible error for the State's attorney to argue to the jury that since the Defendant was serving a life sentence he would not be getting any punishment unless they imposed the death penalty.

In GAMBRELL V. STATE, 120 So. 2d 758 (Miss. 1960), This Court held it was reversible error to instruct the jury that if they returned a verdict of insanity the Defendant would be confined to an insane asylum and would be freed when he was restored to his sanity, the Court pointing out that this instruction was probably partly responsible for the conviction in that case.

In. SMITH V. STATE, 200 So. 2d 313 (Miss. 1969), this Court held it to be reversible error for the prosecutor to tell the jury that if they found the Defendant insane and let him go to an asylum, he would be released upon the public when the asylum should announce him restored to sanity.

In all of these cases and others, this Court had clearly indicated that it is no business of the State of Mississippi in it's closing argument to the jury to comment upon such matters as when a person who is insane may be released or when one may

be eligible for parole. Additionally, there are absolutely no facts and evidence to substantiate or support this type of argument, and the Appellant respectfully submits that it had an overwhelming affect in inducing the jury in this case to return a verdict of death.

PROPOSITION NINE: The Court erred in refusing Defendant's instructions number D-2, D-4, D-6, D-7, D-10, D-12, D-11, and D-9.

The Defendant's jury instruction D-2 requested that the Court instruct the jury that should they be unable to unanimously agree on a verdict the Court would sentence the Defendant to life imprisonment. (R-812) (A 22)

In YATES V. STATE, 175 So. 2d 617, (Miss. 1965), this Court upheld the giving of such an instruction and stated that it was proper. This instruction was refused by the Court, and Appellant respectfully suggest that this refusal was erred, in that in it's absence the jury could have, and probably was, lead to believe that unless they returned a verdict in this case that the Defendant would have to be retried or would be set free.

In instruction D-4 the Defendant requested that the Court instruct the jury that in considering mitigating circumstances that they should consider whether or not the Defendant would pose a danger to others or to society should he be sentenced to life imprisonment rather than death. (A 22) (R-814)

Dr. Brad Fisher, a psychologist and an expert in the study of prisoners and prisoners on death row, testified that from the test given in his consultation with the Defendant that were he incarcerated in prison for the remainder of his life he would not pose a danger to others or to society. (A 20-21)(R717-731) Our death penalty statute requires that the jury be instructed as to any item that can be reasonably relevant as to whether or not

the Defendant should suffer death or life imprisonment.

In COLEMAN V. STATE, 378 So. 2d 640 (Miss. 1979), this Court committed itself to the individualized consideration of mitigating circumstances. The Appellant respectfully submits that this was a relevant mitigating circumstances, appropriate for consideration and the Court's refusal of this instruction was reversible error.

Instruction number D-6 and D-7 are substantially the same. They requested that the Court instruct the jury that even that if the mitigating circumstances did not outway the aggravating circumstances that they were not required to impose the death penalty but could nevertheless sentence the Defendant to life imprisonment. (A 22) (R816-817) There is nothing in Section 99-19-101 of the Mississippi Code of 1972, anotated, as amended, which provides that the jury must impose the death penalty in all events when the aggravating circumstances outway the mitigating circumstances. The matter is still optional with the jury, and indeed, any other arrangement would violate of the Constitution of the State of Mississippi and of the United States of America.

Jury instruction number D-10 requested that the Court instruct the jury that Warren L. Seals was an accomplice to the crime of capitol murder and under the law could receive death or life imprisonment, but that the State of Mississippi had chosen not to indict him for capitol murder and that they could take this into consideration in viewing his testimony and also in deciding whether ROBERT C. GILLIARD, JR., should be sentenced to death or life imprisonment. (A 22-23) (R-818) The Court granted an instruction which sufficiently cautioned the jury concerning Seals testimony; however, it was relevant for the jury to consider the punishment of

Seals in determining whether the Defendant, GILLIARD, should be sentenced to death or life imprisonment. Under the particular facts in this case the disparity in the sentences of the participants in this crime is so great as to be in abuse of prosecutorial discretion and so varying to be unconscionable. SULBERSON V. STATE, 379 So. 2d 499 (Miss. 1979)(See dissenting opinion)

In Instruction D-9 it was requested, among other things, that there be listed as a mitigating circumstance the fact that the Defendant acted under the substantial domination of another person. (A 23)(R820-822) The testimony of Patricia Ann McCullum (A 16-17)(R633-643), ROBERT C. GILLIARD, JR.,(A 17-18)(R644-669) and Dr. Brad Fisher (A 20-21)(R717-731) reported the giving of this item as an element of mitigation. As stated by this Court in Coleman, supra, mitigating circumstances should be considered on an individualized basis, and the Appellant respectfully suggest there is ample evidence for the jury to have believed that the Defendant so acting and they should have been given a specific opportunity to consider this as an item of mitigation.

PROPOSITION TEN: The Court erred in granting the Court's Instruction C-20, State's S-A, as amended.

This instruction, which was submitted to the jury, informed the jury to consider among other things, the following elements of aggravation:

(1) The capitol murder was committed while the Defendant, ROBERT C. GILLIARD, JR., was engaged in the commission of the crime of robbery.

(2) The Defendant, ROBERT C. GILLIARD, JR., committed the capitol murder for pecuniary gain.

(3) The Defendant, ROBERT C. GILLIARD, JR., committed the capital murder in an especially heinous, atrocious, or cruel manner. (A 24) (R803-805)

The Appellant contends that is was reversible error for the Court to list both the fact that the capital murder was committed

while the Defendant was engaged in the commission of the crime of robbery and that the Defendant committed the capitol murder for pecuniary gain. The Appellant contends that these two should be only one aggravating circumstance, and that it is error for the Court to give them both in the same instruction in that they are duplicative. It also appears that it was the legislative intention to provide that the pecuniary gain aggravating circumstances applied to murder for hire. RILEY V. STATE, 366 So. 2d 19, (Fla. 1979) Every robbery would have necessity have to be committed for pecuniary gain. To allow the State to list both of these items as aggravating circumstances, we contend is reversible error and in the case of robbery both should not be given.

Instruction C-20, State's S-A, as amended, further instructed the jury to consider as an aggravating circumstance that the capitol murder was committed in an especially heinous, atrocious, or cruel manner. (A 24)(R803-806) Certainly, it can be said that any and all murders are especially heinous, atrocious, and cruel because of the unjustifiable taking of a human life. However in the context to the capital murder statute, these words must be construed or considered to mean something more than just the taking of a human life. In RILEY V. STATE, 366 So. 2d 19, (Fla. 1979), the victim died from a gunshot wound in the course of a robbery. One of the aggravating circumstances found was that the murder was committed in "a terribly cruel, ruthless, and heinous manner". The Florida Supreme Court held that this aggravating circumstance must be limited to those capital felonies which are accompanied by such additional acts as to set the crime apart from the normal capital felonies, that is the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

SPINKELLINK V. WAINWRIGHT, 578 F. 2d 582 (5th Cir. 1978) The Appellant respectfully submits that it was reversible error for this item to be listed as an aggravating circumstance in that there is no evidence in the record to substantiate the same in the sense that the words are used under the capital murder statute.

PROPOSITION ELEVEN: The Court erred in refusing to impose a sentence of life imprisonment at the conclusion of all the evidence offered by the State and at the conclusion of the Defendant's evidence, or in the alternative the Court erred in failing to grant Defendant's post-trial motion for vacation of the death sentence and imposition of a life sentence by the Court.

As stated by this Court in BOYINGTON V. STATE, 389 So. 2d 485, (Miss. 1980), it is required to review the death penalty in capitol murder cases so as to make sure that the death penalty is not wantonly or freakishly imposed and it will compare the sentence with other cases of a similar nature. When the entire record is read and considered in this case, the death penalty is disproportionate and it's imposition would be to impose it in a wantonly or freakishly manner. This case is in some respects very simular to that of COLEMAN V. STATE, 378 So. 2d 640 (Miss. 1979), in which this Court reversed a sentence of death and imposed one of life imprisonment after it compared COLEMAN case with others and found that the penalty was disproportionate. When one considers the similarities of this case to COLEMAN and the minor punishment of the accomplice Seals, this case at Bar falls within this rule, and we respectfully represent that this Court, considering this and all the other errors, should reverse this case for the imposition of a sentence of life imprisonment.

CONCLUSION

The Appellant respectfully submits that each error, and all errors cumulatively, require that this case either be reversed for a new trial or that this Court remand the same for a sentence of life imprisonment after vacating the penalty of death.

Respectfully submitted,

ROBERT C. GILLIARD, JR.

BY: J. Ronald Parrish
HIS ATTORNEY

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Public Defender
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Attorney for Appellant

CERTIFICATE

I, J. Ronald Parrish, Attorney for Appellant, ROBERT C. GILLIARD, JR., do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the Honorable Bill Allain, Attorney General for the State of Mississippi, P. O. Box 220, Jackson, Mississippi.

This the 4th day of August, 1982.

J. Ronald Parrish

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